Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD MNDC FF
MNDC MNSD FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by both the Landlords and the Tenants.

The Landlords filed on August 22, 2014, to obtain a Monetary Order to keep all or part of the security deposit; for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; and to recover the cost of the filing fee from the Tenants for this application.

The Tenants filed on August 29, 2014, and amended their application on January 12, 2015, to obtain a Monetary Order for: the return of double their security deposit; for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; and to recover the cost of the filing fee from the Landlords for this application.

The hearing was conducted via teleconference and was attended by the Landlord, the Landlord's Father, the Landlords' Agent, and both Tenants. . Each party gave affirmed testimony and confirmed receipt of evidence served by each other.

On a procedural note, the Landlord spoke English very well at the beginning of this hearing and answered my direct questions with no problems while I was checking the participants into the hearing. Despite being directly involved with these Tenants during the tenancy, the Landlord and his father requested that the Landlord's Agent testify on their behalf. During the course of this hearing I felt it necessary to ask the Landlord direct questions about his alleged residency at the rental property to which he claimed he did not understand. At that point I requested the Agent to translate my questions to the Landlord.

At the outset of the hearing I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the conference would proceed.

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1) Have the Landlords proven entitlement to monetary compensation?
2) Have the Tenants proven entitlement to monetary compensation?

Background and Evidence

It was undisputed that the Tenants had occupied this rental unit since September 1, 2009, entering into subsequent fixed term tenancy agreements. The most recent tenancy agreement was effective on September 1, 2011 and switched to a month to month tenancy after 1 year. Rent of $1,350.00 was due on or before the first of each month and on August 22, 2009 the Tenants paid $650.00 as the security deposit. This tenancy ended on July 31, 2014 when the Tenants vacated the rental unit in accordance with a 2 Month Notice to end tenancy served upon them on May 26, 2014.

No condition inspection report form was completed at the beginning of this tenancy. Although the parties attended a move out inspection the Tenants disagreed with what the Landlord wrote on the condition form and refused to sign the form. The Tenants served the Landlords with their forwarding address, in writing, on August 11, 2014.

The Landlord's Agent testified that the Landlords now seek compensation for damage to the unit, site or property in the amount of $772.65 as follows:

1) $24.29 for hydro costs from July 17, 2014 to August 1, 2014. The Landlords did not submit the hydro bill for this period into evidence.
2) $132.36 for hydro costs from May 15 to July 16, 2014. The Landlords did not submit the hydro bill for this period into evidence. They did however, submit two other hydro bills for periods after this tenancy ended.
3) $33.60 for painting and repairs to the walls in the rental unit. Specifically this was to cover costs to paint over the children's heights that were written on the wall and to repair 3 nail holes that were not repaired by the Tenants.
4) The claim for the removal of the security system was withdrawn by the Landlords' Agent during this hearing.
5) $44.80 to replant the grass in an area where the Tenants' had left a hole after removing a bush or plants.
6) $448.00 for the cost to remove the Tenants' flower garden.

In support of the amounts claimed for painting, repairs, lawn seeding, and garden removal, the Agent referenced photographs provided in their documentary evidence that

were taken on July 31, 2014 and an invoice for $1,585.47 that was provided in their evidence at page 10 and is dated Oct 2014.

In response to the Landlords' monetary claim the Tenants disputed every amount and item claimed for the following reasons:

1) No evidence was provided to substantiate the amount claimed for hydro from July 17, 2014 to August 1, 2014.
2) No evidence was provided to substantiate the amount claimed for hydro from May 15 to July 16, 2014.
3) The Tenants submitted that they had patched most of the holes in the walls; however, they did acknowledge that they missed the 3 holes as shown in the Landlords' photos. The Tenants argued that when the Landlord pointed those items out to them during the walk through the Tenants offered to come back and repair those two areas. They stated that they were told that the Landlords had already changed the locks and that the Landlord told them "we'll take care of them". They argued that they were not provided the opportunity to return to repair those items; therefore, they should not have to pay to have them repaired.
4) The claim for the removal of the security system was withdrawn by the Landlords' Agent during this hearing so no testimony was required from the Tenants on this matter.
5) The Tenants pointed to the photograph provided at page 17 of the Landlords' evidence, which indicates it was taken in January 2015. The Tenants argued that that photo clearly shows weeds and not grass in the area where they removed their flowers so the Landlords should not be compensation $44.80 to replant the grass, as they clearly did not plant grass seed there.
6) The Tenants argued that the flower garden was in existence at the time they moved into the rental property. They submitted that they obtained permission from the Landlords to plant additional plants in the garden during their tenancy. The Tenants argued that their tenancy agreement did not stipulate that they were required to remove all plants and roots from the garden at the end of their tenancy.

In addition to the above, the Tenants pointed to a photograph of a garbage can found at page 18 of the Landlords' evidence and noted that the garbage can was sitting in the area where the garden used to be and which now shows a bed of gravel. They argued that the Landlords' claim is to cover their costs to change the garden to a gravel pad which the Tenants are not responsible for, as the garden was in existence at the time they moved into the rental unit.

The Tenants submitted that their claim was for the return of double their security deposit $1,300.00 (2 x $650.00) due to the Landlords not returning their deposit plus $2,700.00 which is compensation equal to two month's rent because the Landlords did not use the property for the reason they were evicted.

The Tenants submitted a copy of the 2 Month Notice dated May 26, 2014, which

indicates the Landlords were ending their tenancy in accordance with section 49 of the Act for the following reason:

> *The rental unit will be occupied by the landlord or the landlord's spouse or a close family member (father, mother, or child) of the landlord or the landlord's spouse.*

The Tenants argued that they had to vacate the rental unit by July 31, 2014, in accordance with the 2 Month Notice. They pointed to the documentary evidence submitted by the Landlords which prove that it was the downstairs tenant who moved into their rental unit upstairs from August 15, 2014 to September 15, 2014, and not the Landlord. The Tenants argued that they travel by the rental unit regularly and that they have looked inside the unit and there has been no furniture moved into the rental unit; none of the Landlord's cars have ever been parked in the driveway; and no one has been seen living at the rental unit since the downstairs tenant moved back into her downstairs suite.

The Agent confirmed that the downstairs tenant occupied the rental property from August 15, 2014 to September 15, 2014 and argued that the Landlord moved into the property shortly afterwards. She pointed to the Landlord's documentary evidence which included letters from neighbours who have stated that they know the landlord S.K.Y. has been residing in the rental property.

Given the circumstances before me I felt it necessary to ask the Landlord to provide testimony regarding his alleged residency at the rental property. Each time I asked the Landlord the dates he moved into the rental property he answered that the downstairs tenant moved upstairs from August 15, 2014 to September 15, 2014. When I asked the third time the Landlord said that he did not understand my question. I requested the Agent to translate my questions to the Landlord and at the beginning he answered immediately. The first question was what date had the Landlord moved into the upstairs rental property, to which he answered, "October 1, 2014". Then when I asked the Agent to translate "what date did the Landlord move out of the upstairs of the rental property"; the Landlord did not answer and instead he engaged in a conversation with the Agent. The Landlord refused to answer my question when asked a second and third time and continued to state that he did not understand my question, despite it being translated into his own language.

Analysis

A party who makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided for in sections 7 and 67 of the *Residential Tenancy Act*. Accordingly an applicant must prove the following when seeking such awards:

1. The other party violated the Act, regulation, or tenancy agreement; and

2. The violation caused the applicant to incur damage(s) and/or loss(es) as a result of the violation; and
3. The value of the loss; and
4. The party making the application did whatever was reasonable to minimize the damage or loss.

All four criteria must be met in order to meet the test for loss and to be awarded monetary compensation.

Section 21 of the Regulations provides that In dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

Landlords' Application

The Landlords have sought compensation for hydro costs from July 17, 2014 to August 1, 2014 and May 15 to July 16, 2014; however, they did not submit copies of the hydro bills to prove the amounts being claimed. Accordingly, I find the Landlords have not met criterion # 3 to prove the actual cost; therefore, their claim for hydro costs is dismissed, without leave to reapply.

Section 32 (3) of the Act provides that a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

Section 37(2) of the Act provides that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean and undamaged except for reasonable wear and tear.

The Residential Tenancy Policy Guideline # 1 provides that most tenants will put up pictures in their unit. The landlord may set rules as to how this can be done e.g. no adhesive hangers or only picture hook nails may be used. If the tenant follows the landlord's reasonable instructions for hanging and removing pictures/mirrors/wall hangings/ceiling hooks, it is not considered damage and he or she is not responsible for filling the holes or the cost of filling the holes.

It was undisputed that the Tenants had missed filling three small holes in the wall and had not painted over writing on the wall that recorded their children's height. Furthermore, neither the Landlord nor his Agent disputed the fact that the Tenants had offered to return to the property to complete the repairs and that offer was refused.

Based on the above, I find the Landlords have provided insufficient evidence to prove they did what was reasonable to mitigate their loss. Had they allowed the Tenants to come back and fill the holes and paint over the writing on the wall, the Landlords would

not have suffered a loss. Accordingly, I find the Landlords have not met criterion # 4 of the test for damage or loss, and I dismiss their claim for $33.60 for painting, without leave to reapply.

The claim for the removal of the security system was withdrawn by the Landlords' Agent during this hearing.

The Landlords claimed $44.80 to replant grass in an area where the Tenants' had left a hole after removing a bush or plants. The Landlords did not submit evidence to prove that grass seed was actually purchased or the charge to planting the seed. The Tenants pointed to the Landlord's photographic evidence taken in January 2015 which clearly showed weeds growing in that subject area and not new grass. Accordingly, I find there was insufficient evidence to prove the Landlord's actually suffered a loss for the amount claimed, and the claim is dismissed, without leave to reapply.

With respect to the Landlords' claim of $448.00 for the cost to remove the Tenants' garden, the Landlords relied upon a receipt dated October 2014 for $1585.47 that was itemized as follows:

(1) House wall filling holes and re-painting
(2) Back yard garbage cleaning and removal

The undisputed evidence before me was that there was a garden in existence prior to the start of this tenancy and the Tenants simply added more flowers and bushes to the existing garden. There was no evidence before that would suggest the Tenants were required to remove the garden and all of the plant roots at the end of their tenancy. The Landlords photographic evidence supported the Tenants' submission that the Landlords removed the garden and replaced it with an area spread with gravel.

Based on the above, and in absence of a move in condition inspection report form I find the Landlords have failed to establish that the Tenants had breached the Act by leaving the pre-existing garden in its original place. Furthermore, there was no evidence before me of the actual cost to remove the garden. Accordingly, I find the Landlords have not provided sufficient evidence to meet criterion # 1 or #3, and I dismiss their claim for $448.00, without leave to reapply.

The Landlords have not succeeded with their application; therefore, I decline to award recovery of their filing fee.

Having dismissed the Landlords' claim in its entirety, the Landlords have no legal right to retain the Tenants' security deposit and must return the deposit to the Tenants, forthwith.

Tenant's Application

Section 24(2) of the RTA provides that the right of a landlord to claim against a security deposit or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

The undisputed evidence was that the Landlords did not complete a condition inspection report form at move in and as such their right to claim damages against the security deposit had been extinguished, pursuant to sections 24 of the Act; therefore, they should have returned the Tenants' security deposit.

That being said, section 38 of the Act provides a landlord with ***two options*** on how to deal with the disbursement of security deposits: (1) the landlord must file an application for Dispute Resolution to make a claim against the deposit or (2) the landlord must return the deposit to the tenant. [My emphasis added].

The evidence before me supports that the tenancy ended July 31, 2014, the Landlords were provided the Tenants' forwarding address on August 11, 2014. The Landlords filed their application for dispute resolution on August 22, 2014, within the required 15 day period.

I find that the Landlords complied with Section 38(1) of the Act, filing their application within the required 15 day period, and that the Landlords are **not** subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the security deposit and the landlord must pay the tenant double the security deposit.

Based on the above, I dismiss the Tenants' claim for the return of double their security deposit. As noted above I found the Landlords were not entitled to retain any portion of the security deposit; therefore, I grant the Tenants monetary compensation for the return of their deposit $650.00 plus interest of $0.00 for a total amount of **$650.00.**

Section 51 (2) of the Act stipulates that in addition to the amount payable under subsection (1), if steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice, the landlord, or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.

After careful consideration of the evidence before me I favored the Tenants' evidence that the rental unit was used for the purpose they were evicted; which was the unit would be occupied by the Landlord. I favored the Tenants' evidence over the Landlords' evidence because the Tenants evidence was forthright, credible, and their admittance

that they failed to fill three holes and failed to paint over the height written on the wall. In my view the Tenants willingness to admit fault when they could easily have stated they did repair those items lends credibility to all of their evidence.

Despite the Landlord's ability to understand and speak English clearly at the outset of this hearing, he claimed that he did not understand my direct questions regarding occupancy of the rental unit, even after his Agent translated the questions to him in his own language. Given the circumstances presented to me during this hearing, I find the Tenants' submission that the Landlord has not resided in this rental property to be plausible given the circumstances presented to me during the hearing and as supported in the documentary evidence. Furthermore, the Landlord and his Agent confirmed that the unit was occupied by the downstairs tenant for one month, immediately following the Tenants moving out, not the Landlord.

Based on the above, I find that the rental property was not used for the intended reason listed on the 2 Month Notice, for a period of six months (August 1, 2014 to January 31, 2015). Accordingly, the Tenants are entitled to compensation equal to two month's rent of **$2,700.00** (2 x $1,350.00), pursuant to section 51(2) of the Act.

The Tenants have primarily succeeded with their application; therefore, I award recovery of the **$50.00** filing fee.

Conclusion

I HEREBY DISMISS The Landlords' claim, without leave to reapply.

The Tenants have been awarded a Monetary Order for **$3,400.00** ($650.00 + $2,700.00 + $50.00). This Order is legally binding and must be served upon the Tenant. In the event that the Tenant does not comply with this Order it may be filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: February 12, 2015

Residential Tenancy Branch